Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for Decision

Association des policiers et policières de Pessamit,

complainant,

and

Conseil des Innus de Pessamit,

respondent.

Board File: 27158-C
Neutral Citation: 2011 CIRB **565**
January 18, 2011

The Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. Patrick J. Heinke and Norman Rivard, Members. A hearing was held in Baie-Comeau on June 16 and 17, 2010. Following the hearing, the Board sent the union a letter dated June 22, 2010, in which it gave the union until August 31, 2010, to file any further submissions it might wish to make to complement its oral arguments. Since the Board did not receive any further submissions, it took the matter under advisement and hereby renders its decision.

Appearances

Mr. Ken Rock, for the Association des policiers et policières de Pessamit;
Mr. Jocelyn Dubé, for the Conseil des Innus de Pessamit.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

I–Complaint

[1] This is a complaint of unfair labour practice filed on November 17, 2008, pursuant to sections 24(4), 94(3)(*a*)(i) and 97(1) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) by the Association des policiers et policières de Pessamit (the Association or the union) on behalf of four public safety police officers in Pessamit: Ms. Denise Fontaine and Messrs. Carl Bacon, Robert Picard and Jean-Patrick Rock (the complainants or the police officers). The Association alleges that the Conseil des Innus de Pessamit (the employer) terminated the employment of the four complainants as a result of it filing, on October 21, 2008, an application for certification to represent the public safety police officers in Pessamit. On March 29, 2010, counsel for the employer advised the Board that Mr. Jean-Patrick Rock, one of the complainants in the matter, had withdrawn from the complaint.

[2] By way of remedy, the Association is asking that the Board order the employer to reinstate the complainants and compensate them for the wages lost since October 17, 2008. Subsidiarily, the Association challenges the legality of the resolution passed by the Conseil des Innus de Pessamit to terminate the employment of the four police officers. The Association submits that the resolution was not legally passed and so the employment relationship between the employer and the four police officers had never been severed.

[3] Although this complaint was filed by the Association on November 17, 2008, its consideration was delayed a number of times as a result of the employer's challenge of the Board's constitutional jurisdiction to entertain it and the application for certification filed on October 21, 2008. On March 4, 2010, the Board rendered a short decision, with reasons to follow, in which it confirmed its constitutional jurisdiction to deal with the employer's labour relations activity. The reasons for decision (*Conseil des Innus de Pessamit*, 2010 CIRB 523) were issued on June 8, 2010. On March 4, 2010, having dismissed the employer's preliminary objection, the Board allowed the certification application filed by the union (see *Conseil des Innus de Pessamit*, 2010 CIRB LD 2301). The Board set the hearing dates for the complaint in a letter sent to the parties on March 18, 2010.

[4] Three witnesses were heard for the employer: Mr. Yan Riverin, the former manager of public safety; Mr. Jérôme Bacon, the current manager of public safety; and Mr. Jean-Marie Vollant, the secretary-treasurer of the Conseil des Innus de Pessamit.

[5] Counsel for the union called the following persons to testify: Ms. Denise Fontaine and Messrs. Robert Picard and Carl Bacon, all former public safety police officers in Pessamit.

[6] The Board does not intend to provide a full account of the testimony or even discuss all of the evidence presented; rather, it will limit itself to outlining the evidence considered relevant and necessary for the purposes of this decision. The evidence was drawn from the parties' written submissions and the testimony heard during the two days of the hearing. At the start of the hearing, counsel for the Association informed the Board that it was amending the complaint and withdrawing the allegations relative to section 24(4) of the *Code*. The Board therefore remains seized of the complaint against the Conseil des Innus de Pessamit pursuant to sections 94(3)(*a*)(i) and 97(1) of the *Code*. Counsel for the Association also indicated that he intended to present common evidence for all three of the complainants.

II–Background and Facts

[7] On October 21, 2008, the Association filed an application for certification to represent the public safety police officers in Pessamit. On November 6, 2008, the employer's director general sent four police officers, including the three complainants herein, a registered letter advising them that their employment was being terminated. The letter, sent to each of the complainants, read as follows:

> Subject: Notice of Dismissal
>
> ...
>
> This is to advise you that, on October 20, 2008, Mr. Yan Riverin, Manager of public safety, submitted a recommendation to the Conseil des Innus de Pessamit that you be dismissed by reason of abandonment of your position, pursuant to section 12.7.2 of the employment policy in effect.
>
> I subsequently referred your dismissal file to the political level for approval. As a result, at the regular meeting of **October 27, 2008**, the Conseil des Innus de Pessamit agreed to apply the provisions cited by the manager of public safety in his report. Any compensation to which you are entitled will be paid to you in the coming days.

> You may appeal this notice by sending your reasons for appeal, with a certified copy to the Chief and to the Conseil members, within five (5) days of receipt of this letter.
>
> (translation; emphasis added)

[8] Based on the material entered into evidence by the Association and the employer, the labour relations problems within Pessamit's public safety appear to have started in the summer of 2007. Such problems related primarily to work schedules and periods of leave for public safety police officers in Pessamit. Despite meetings held between management and staff to resolve the disputes, the situation does not appear to have improved since, on October 20, 2008, Mr. Yan Riverin, Manager of public safety, submitted a recommendation to the director general of the Conseil des Innus de Pessamit that the employment of four police officers, including the three complainants herein, be terminated.

[9] On October 27, 2008, after considering a document dated October 20, 2008, which had been signed by the manager of public safety and submitted to the director general of the Conseil des Innus de Pessamit, the employer confirmed that it had decided to terminate the employment of the four police officers mentioned above. The document in question, entitled "*Recommendations (Public Safety of Betsiamites and the Conseil des Innus de Pessamit)*" (translation) (hereinafter *Recommendations*), provided an overview of the situation during the summer of 2008 and the tensions regarding work schedules and periods of leave for the police officers. The 26-page document also described the oral and written communications between management and the Pessamit police officers during the months of May, June, August, September and October 2008, the pressure tactics used by the four police officers during this period, the suspension of the officers, and the attempts by the manager of public safety to reintegrate the officers into Pessamit's police force. The manager of public safety concluded his report by recommending that the employer terminate the employment of the four police officers in question.

[10] The minutes of the regular meeting of the Conseil des Innus de Pessamit held on October 27, 2008, shows that the following resolution passed unanimously:

> It is decided to accept the recommendation of the director general to implement the recommendations of the manager of public safety regarding the abandonment by ... of their positions in accordance with the provisions of the employment policy cited by the manager of public safety in his report.
>
> (translation)

[11] The Association states that the three complainants were dismissed because of their union activity. It alleges that the employer was told about the filing of the application for certification on Friday, October 24, 2008, just days before the Conseil des Innus de Pessamit made its decision regarding the complainants.

[12] Section 94(3)(*a*)(i) provides, *inter alia*, that no employer shall lay off or discipline any person because of that person's participation in union activities. In the instant matter, the Board must decide whether the decision made by the Conseil des Innus de Pessamit to terminate the complainants' employment was motivated by anti-union animus. Pursuant to section 98(4) of the *Code*, where a complaint is made in respect of an alleged failure to comply with section 94(3) of the *Code*, the written complaint is itself evidence that such failure actually occurred and, if any party alleges that such failure did not occur, the burden of proof thereof is on that party. The Board therefore asked counsel for the employer to produce his evidence first.

III–Testimonies

A–The Employer

1–First Witness: Yan Riverin

[13] The first witness, Mr. Yan Riverin, was the manager of public safety in Pessamit at the time the complainants were dismissed in October 2008. He provided a detailed description of what had occurred during the summer of 2008. The events in question are also set out in the October 20, 2008, report mentioned earlier, *Recommendations*. Mr. Riverin stated that, between May 7 and August 12, 2008, he had sent out three memoranda, either to all staff or to the police officers only, to remind them of the importance of reporting for work regularly and respecting the procedure for leave allocation. The witness explained that the month of August 2008 had been a very busy time because

of the August 15 holiday, which he explained was the equivalent of Quebec's holiday on June 24. Also, elections for the members of the Conseil des Innus de Pessamit had been held during the same period. Again according to the witness, it was a time of celebration during which things could get out of hand and so the police workforce at full strength was needed to ensure safety on the Pessamit reserve.

[14] On August 13, 2008, two of the complainants sent a letter on behalf of the patrol officers to the acting manager of public safety, who was filling in while the manager of public safety was on leave. In that letter, the complainants faulted management for not abiding by the patrol officers' summer schedule and advised the employer that, to protest, starting on August 14, 2008, the patrol officers would not report for work until a meeting was arranged with human resources management and the matter was settled once and for all. Between August 14 and 20, 2008, four police officers, including the complainants, failed to report for work. On August 20, 2008, management suspended the four police officers and sent them a letter to that effect. Mr. Riverin explained that he had planned individual meetings with the police officers on September 3, 2008, with a view to lifting their suspensions. The letter, adapted to each of the four officers, read as follows:

> September 1, 2008
>
> ...
>
> Subject: Invitation to a Meeting Regarding Notice of Suspension
>
> Dear Sir:
>
> On August 20, 2008, Manager of public safety Yan Riverin gave you a letter containing a notice of suspension. The administrative investigation and analysis of the matter have now been completed.
>
> You are invited to a meeting on September 3, 2008, at 11 a.m., in my office at 80 Ashini Street in Betsiamites, to finalize the disciplinary process and give you your work schedule.
>
> I hope that I can count on your cooperation.
>
> Sincerely,
>
> (translation)

[15] On September 3, 2008, the complainants responded to the above letter in a letter to the manager of public safety indicating that they had no intention of meeting with him in person that day, as he had asked. On September 4, 2008, Mr. Riverin sent the complainants a letter to inform them that

their suspension had been lifted and that their work schedules were being sent to them. The letter, reproduced in *Recommendations* referred to above, indicated the following in the subject line: "End of Your Suspension–Return to Work" (translation).

[16] The witness indicated that, despite being advised of the termination of their suspension, the complainants had failed to report for work in accordance with the schedule they had been given.

[17] According to the witness, the director general of the Conseil des Innus de Pessamit, Mr. Gérald Hervieux, met with the complainants on September 24 and 25, 2008, and asked them to report for work. According to the witness, the complainants did in fact go to the public safety offices on September 25, 2008 to get their work schedules. That same day, they apparently all told the witness that they were "thinking about it"(translation) since the work schedules did not suit them. The witness stated that it was then that he had understood that the complainants had left their employment.

[18] Mr. Riverin went on to say that a last attempt to reintegrate the complainants into the workforce had been made in early October 2008. The letter he had sent each of the complainants read as follows:

> **Subject: Reinstatement–Third (3rd) Notice**
>
> ...
>
> On August 20, 2008, you were suspended from your position as a public safety peace officer in Pessamit owing to absence without leave.
>
> On September 4, 2008, your suspension was officially lifted and you received a copy of your work schedule. You refused to report for work.
>
> On September 26, 2008, I again provided you with a work schedule with a view to reintegrating you into the workforce. You again refused to report for work.
>
> This is your last and final notice. You are asked to come to my office this Friday, October 10, 2008, at (time: CB: 08:30 a.m.; DF: 09:30 a.m.; RP: 10:30 a.m.; and JPR: 11:30 a.m.) for a meeting to discuss your future as a public safety police officer in Pessamit.
>
> If you are reinstated, we will sign a reinstatement agreement and a work description, and your oath will be renewed. You will also be given a tentative work schedule and will resume your duties immediately.

If you refuse to come to the meeting and to report for work, I will have no choice but to deduce that you are leaving your employment, and the necessary administrative measures will be taken to close the file.

You are asked to please act accordingly.

(translation)

[19] According to the witness, the above letter was given to each of the police officers in person, and a meeting was held with each of them. Mr. Riverin added that none of them had signed the reinstatement agreement on the spot, and he had given the police officers 24 hours to make a decision. Mr. Riverin stated that, on October 11, 2008, he had received a phone call from Officer Denise Fontaine advising him that none of the four officers would be reporting for work and that he would be receiving a letter to that effect.

[20] On October 15, 2008, Mr. Riverin received a letter signed by the complainants, which stated the following:

Subject: Legal Advice

Following the individual meetings held with the officers regarding the reinstatement agreement, this is to inform you that we are exercising the right to obtain legal advice as indicated in your document and also taking the necessary time to consider your document.

(translation)

[21] On October 15, 2008, witness Riverin sent the complainants a letter confirming that, since he had not received any reply from them within the time frame stated, the reinstatement agreement offer was being withdrawn and a recommendation would be made to close their files.

[22] On October 17, 2008, Mr. Riverin received a letter from the complainants' attorney informing him that the complainants were prepared to be reinstated in their positions. Mr. Riverin called Ms. Fontaine, one of the complainants, to advise her that he would be making a recommendation and that the matter was on hold.

[23] Witness Riverin emphasized that, when he had met with the complainants individually between October 9 and 11, 2008, to give them the reinstatement agreement, he had felt confident that they would return to work. However, when Ms. Fontaine had called him on October 11, 2008, to tell him

that she and her co-workers refused to sign the agreement, he had understood that they would not be returning. He stressed that, when Ms. Fontaine had spoken to him, she had been speaking on behalf of the other officers.

[24] Mr. Riverin stated that he had informed the Conseil des Innus of the difficult situation involving the four police officers on October 7, 2008. He indicated that his report had been partially written at that point in time. He added that he had attended a meeting of the Conseil des Innus on October 14, 2008, and provided an update on the matter regarding the police officers. The following is an excerpt from the minutes of the meeting of the Conseil des Innus:

> **Excerpt From Minutes of Regular Meeting of October 14, 2008**
>
> The Chief added that, if the police officers rejected the reinstatement agreement, the Conseil would have to make a decision. Yan Riverin sent a letter regarding reinstatement with the same conditions as usual. He met with the officers individually and gave them 24 hours to provide an answer if they wanted to be reinstated without penalty. Denise Fontaine answered for the others, saying that they refused to return to work. If no agreement can be reached, the disciplinary process will have to be applied, and they see that as a threat. The suspension was lifted on September 3, 2008, but the police officers have not worked since then.
>
> If they were going to reject the agreement, the police officers should have done so in writing. The manager of public safety prepared a work schedule, which they refused to accept. The schedule cannot be changed.
>
> Yan Riverin will consult with, Mr. Boisjoli, and a decision will be made.
>
> (translation)

[25] Mr. Riverin stated that he had sent the police officers a letter on October 15, 2008, as stated above, advising them that he would be making a recommendation and that their files were on hold. He stated that he had completed the report for the Conseil des Innus on October 20, 2008, and had then sent it to Mr. Hervieux.

[26] On cross-examination, Mr. Riverin explained what education and training he had that qualified him for the position of manager of public safety in Pessamit. He explained the problems and the demands made by the police officers on the force, which started in September 2007. He indicated that he had met with Mr. Picard, the Chief of the Conseil des Innus de Pessamit, to inform him that four police officers were refusing to report for work. When counsel for the complainants referred to a letter that the officers had sent to Mr. Hervieux on February 25, 2008, demanding that Mr. Riverin

resign, the witness indicated that he had found out about the letter in question on March 3 or 4, 2008. He also admitted to having known about the various written communications between the police officers and Mr. Hervieux.

[27] Mr. Riverin indicated that he himself had made the decision to end the police officers' suspension on September 10, 2008, and to replace it with a reprimand, as indicated in the letter of September 10, 2008, in this regard.

[28] When asked by counsel for the complainants why he had not recommended that the complainants be dismissed on October 14, 2008, at the meeting of the Conseil des Innus de Pessamit, rather than on October 20, 2008, Mr. Riverin explained that he had had to let the process run its course. He added that, on October 15, 2008, when he had seen that the police officers had not responded within the 24-hour time frame they had been given, he had recommended that they be dismissed.

[29] The witness indicated in his reply that he had never known that the complainants had been involved in union activity from October 14 to 20, 2008.

2–Second Witness: Jérôme Bacon

[30] Mr. Bacon has been the acting manager of public safety in Betsiamites since July 2009, having replaced Mr. Riverin. He started out as a patrol officer and was promoted to sergeant in 2007. Around August 13, 2008, he was acting as manager of public safety while Mr. Riverin was away on parental leave. He admitted that, as early as August 2008, he had been aware of the pressure tactics being used by the complainants, which left only four police officers, including himself, to cover the territory. He indicated that, during that period, he had worked eight-hour shifts every day. He stressed that, from September 4 to mid-October, the absence of the four officers had meant that the remaining officers had had to work twice as hard. The staff had been tired and it had been necessary to call on psychological support services. He stated that everyone had been disappointed about the four officers' unwillingness to return to their positions within the police force.

[31] The witness indicated that he had learned that the police officers would not be returning at a meeting with Yan Riverin on October 11, 2008. Ms. Fontaine had called Mr. Riverin during the meeting. The witness stated that he had never heard any talk of union activity of any kind within Pessamit's police force.

[32] During cross-examination, he indicated that he had also never heard any "union" talk while working as a patrol officer, that is, prior to July 2007.

3–Third Witness: Jean-Marie Vollant

[33] The third witness was the secretary-treasurer of the Conseil des Innus. He is the person responsible for keeping the record of minutes of meetings of the Conseil des Innus de Pessamit. He is also the one who authenticated the excerpt from the minutes of the October 14, 2008, regular meeting of the Conseil des Innus, attended by Mr. Riverin, by affixing the Conseil's stamp. He did the same in regard to the resolution adopted on October 27, 2008, to accept the director general's recommendation in support of the recommendations of the manager of public safety concerning the complainants' abandonment of their positions.

[34] During cross-examination, witness Vollant explained how minutes were drafted. He indicated that the two excerpts from the minutes cited above were the product of discussions held at the meetings. He stated that it was only after the fact that minutes were drafted and decisions became the subject of resolutions.

[35] Before hearing the union's evidence, the Board dealt with an objection raised by counsel for the union regarding the complainant's records of employment issued by the employer, which counsel for the employer wished to enter into evidence. The Board allowed the said records of employment to be entered into evidence, subject to their relevance.

[36] Counsel for the employer called witness Riverin back in regard to the records of employment issued on September 17, 2008. Mr. Riverin alleged that he had received a call from an investigator with Service Canada concerning employment insurance claims filed by the complainants.

Mr. Riverin had allegedly confirmed that the complainants had been suspended effective August 21, 2008, but had pointed out to Service Canada that their suspension had been lifted on September 4, 2008, and they should therefore have been working.

B–The Union

[37] Counsel for the union began by informing the Board that he did not intend to have Mr. Gérald Hervieux, Director General of the Conseil des Innus de Pessamit, testify. This decision had been made following a discussion by the parties regarding the advisability of having Mr. Hervieux testify. The union called the three complainants as its witnesses.

1–First Witness: Robert Picard

[38] Mr. Picard is one of the complainants. He worked for Pessamit's public safety as a police officer. He spoke about the meetings that had taken place with Mr. Hervieux in 2008. He stated that he and his fellow officers had trusted Mr. Hervieux. He alleged that he had put a great deal of effort into trying to resolve the dispute between the manager of public safety, Mr. Riverin, and the police officers, going so far as to seek outside help, from Mr. Roch, a former police chief, and help from Mr. Patrice Paul, who worked in human resources for the Conseil des Innus de Pessamit. The police officers had wanted fair, pre-determined work schedules. He stated that Mr. Riverin had refused to acquiesce, had thought that he could unilaterally set schedules and had refused to negotiate in any way.

[39] The witness also spoke about the meeting of October 10, 2008, at which Mr. Riverin had given him the reinstatement agreement. Mr. Riverin had wanted him to sign on the spot, but the witness had wanted to consult a lawyer before making a decision. Mr. Riverin had apparently told him, "you sign and you report for work" (translation). The witness had preferred not to sign. He stated that all of the police officers had wanted to sign the reinstatement agreement and return to work, but only after having consulted a lawyer and having had the opportunity to discuss it amongst themselves.

[40] The witness explained that he had also met with Mr. Hervieux on October 11, 2008, and had consulted a lawyer. He stated that the lawyer had advised Mr. Riverin, in a letter dated October 15, 2008, that the police officers were prepared to sign the agreement. What happened next is amply described in Mr. Riverin's testimony.

[41] During cross-examination, the witness stated that he has been working for the community of Attikamek since September 24, 2009. He admitted that he had filed an employment insurance benefit claim with Service Canada in mid-September 2008 because he had had no income. Service Canada had required the record of employment from the employer to process his claim. The witness admitted having received the said statement from the employer. His employment insurance benefit claim had been denied since, in September 2008, his suspension had been lifted by Mr. Riverin, effective September 4. The witness stated that he would have liked to be able to collect employment insurance benefits, given that he had been without any income that entire time, and to continue to negotiate the terms of his reinstatement with Mr. Hervieux. He alleged that, had the work schedules been satisfactory, the police officers would have signed the reinstatement agreement, but that had not been the case.

2–Second Witness: Denise Fontaine

[42] Ms. Fontaine is one of the complainants in this matter. She also worked for Pessamit's public safety as a police officer. She stated that, throughout the dispute, it had always been the police officers' wish to stay with the Pessamit police force. She also emphasized that the police officers had wanted to settle the dispute internally, but each time they had met with Mr. Riverin, he had been arrogant toward them. She explained that she had represented the police officers in the negotiations with Mr. Riverin. She stated that Mr. Riverin had been "cursory" (translation) in discussions and she had had the distinct impression that he was making fun of them. She alleged that, at each meeting, she had told Mr. Riverin that the police officers were ready to work and were available to meet with him to resolve the disputes, primarily involving work schedules. She admitted to having called on Mr. Hervieux to settle the dispute. She stressed that the police officers had trusted him, since he had been the manager of public safety in the past.

[43] Ms. Fontaine stated that the entire community on the Pessamit reserve had been aware of the labour dispute in the police force and that people had been encouraging them to unionize. She added that, in their discussions with Mr. Hervieux, the police officers had told him that they wanted to get a lawyer and he had answered, "Do what you have to do; you have the right to protect yourselves" (translation). According to Ms. Fontaine, getting a lawyer meant "unionizing". When asked by counsel whether they had spoken to Mr. Riverin about their intention to unionize, the witness indicated, "We couldn't take that risk," since, in her view, Mr. Riverin was too "intransigent" (translations).

[44] The witness indicated that she and the other officers had met with their attorney on October 16, 2008, and had decided to unionize. She added that they had given their attorney the mandate to file an application for certification the next day.

[45] During cross-examination, the witness admitted having met with Mr. Hervieux in August 2008 and having told him that the police officers had no intention of reporting for work until such time as the situation involving Mr. Riverin was resolved. She indicated that she had had the impression that Mr. Hervieux supported the police officers in their actions. She stated that she had remained in contact with Mr. Hervieux. She acknowledged having met with Mr. Riverin on October 11, 2008, and having read the reinstatement agreement that she had been given. She claimed to have been surprised to see Mr. Hervieux's name as signatory.

[46] With regard to the application for certification filed with the Board on October 21, 2008, she stated that this had been a last resort, given the events that had happened after October 11, 2008.

3–Third Witness: Carl Bacon

[47] Mr. Bacon also worked for Pessamit's public safety as a patrol officer and is a complainant in this matter. He spoke about the circumstances that had existed in the period starting on October 11, 2008, when Mr. Riverin had given him the reinstatement agreement. He explained that he had told Mr. Riverin that he did want to be reinstated, but did not want to sign the agreement. With regard to the action taken by the police officers to unionize, he alleged that they (Bacon, Picard, Rock and Fontaine) had kept discussions in this regard to themselves. The discussions had taken place on

October 11, 2008, after Mr. Riverin had given them the reinstatement agreement. The witness stated that that had been the first time they had discussed unionizing.

[48] During cross-examination, the witness acknowledged that his fellow officer, Ms. Fontaine, had been the spokesperson for the group and, when she had held discussions with Mr. Riverin, she had been speaking on behalf of the group. The witness recognized that August 2008 had been a very busy period because of the August 15 holiday and the elections being held that year.

IV–Oral Arguments

A–The Employer

[49] Counsel for the employer challenged the Board's jurisdiction given the evidence before it. He submitted that, since the complainants had filed employment insurance benefit claims, they could not also file a complaint with the Board to protect their rights. He further submitted that the fact of their filing employment insurance benefit claims on September 17, 2008, was tantamount to admitting that they had voluntarily left their employment, at least as of that date. He argued that their absence from work and their refusal to go back to their positions and do their jobs constituted unacceptable abandonment of employment by professionals. He argued that, since what was involved was voluntary leaving of employment, the Board did not have jurisdiction to entertain the complaint.

[50] Further, counsel submitted that there was no evidence showing that the employees had engaged in union activity or that the employer had discouraged employees from exercising their rights to engage in such activity. On the contrary, counsel argued that Mr. Hervieux had told them in October to "assert their rights" (translation).

[51] Counsel stressed that the late summer and early fall of 2008 had been a very busy time because of the August 15 holiday and the elections, and the employer had accordingly been placed in an untenable situation because of the absence of the four police officers and their pressure tactics. Counsel further submitted that the complainants had wanted the head of the manager of public safety and the evidence showed that they had also had the director general's cooperation. Counsel argued

that the complainants had been challenging the leadership of the manager of public safety and that their actions amounted to a takeover bid.

[52] Counsel for the union had argued that the employer had terminated its employment relationship with the four police officers who had initially filed the complaint on October 27, 2008, that is, immediately after learning that they had filed a certification application. Counsel for the employer argued that there was no evidence that the employer had learned of any unionization action whatsoever prior to the filing of the application with the Board. He argued that, according to the evidence, Mr. Riverin had decided to recommend to the employer that the employment of the four complainants be terminated on October 14, 2008, as indicated in the excerpt of the minutes of the regular meeting of the Conseil des Innus de Pessamit held that same day. He alleged that the excerpt of the minutes also indicated that the next meeting would be held on October 27, 2008, clearly showing that the meeting had not been called in reaction to the filing of the application for certification.

[53] Counsel submitted that, although the onus of proof was on the employer in this matter, such presumption was not unchallengeable. He argued that Mr. Riverin's actions were in no way connected with any union activity in which the complainants may have been involved, which in any event had not been brought to Mr. Riverin's attention.

[54] Counsel also submitted that the evidence failed to show that the other public safety police officers had been aware of the unionization activity of the complainants. He argued that Mr. Riverin had acted in good faith throughout the fall of 2008 and had merely exercised his management rights.

[55] Counsel concluded his arguments by emphasizing that the employer had discharged its burden of proof, and cited a number of decisions, including the decision of the Board in *UMG Cable Telecommunications Inc., c.o.b. Napanee-Deseronto Cablevision Ltd.*, 2001 CIRB 105.

B–The Union

[56] Counsel for the union submitted that the evidence showed that there had been a labour dispute between the management of public safety in Pessamit and the complainants and that the way in

which the employer had terminated their employment had been tantamount to unlawful termination. He added that the manager of public safety had completely disregarded the concerns of the complainants, who had been seeking changes within the Pessamit police force. He submitted that the complainants had been working non-stop and the manager of public safety had paid little if any attention to their demands. Counsel stressed that work schedules had been the biggest source of conflict between management and the complainants, but the manager of public safety had felt that this was a matter for him to decide. Counsel added that the complainants had wanted to return to work but had faced a one-sided dialogue on the part of the manager of public safety. He was the boss, he had told the employees.

[57] Counsel also submitted that the complainants had turned to the director general of the Conseil des Innus de Pessamit, Mr. Hervieux, because they had trusted him and had wanted him to act as an intermediary to resolve the situation, which he termed untenable. Counsel argued that the employer was now trying to show that the complainants' employment had ended as a result of what amounted to abandonment of employment, but the manager's report, *Recommendations*, did not indicate this. Counsel stated that the employer had shown flexibility toward the employees until October 11, 2008, and it was then that the employees had begun to fear for their jobs. The reinstatement agreement contradicted the employer's argument that the complainants had abandoned their employment. Counsel stated that the employment relationship had been severed not on October 14, 2008, but on October 27, 2008, at a meeting of the Conseil des Innus de Pessamit. He added that the complainants had wanted to consult a lawyer before signing the reinstatement agreement and had done so as quickly as possible.

[58] With regard to the question of whether the employer had been aware of the union activity, counsel argued that the entire Aboriginal community of Pessamit had known about the labour dispute within the police force and the police officers' wish to unionize even before the application for certification had been filed. He indicated that he was sure that the matter had been brought to the attention of the employer, pointing out that the complainants had talked to Mr. Hervieux about the possibility of unionization as early as October 11, 2008.

[59] Counsel submitted that the version of the facts presented by the complainants was credible and that the complainants had been dismissed because they had tried to assert their rights. He submitted case law in support of his case.

V–Analysis and Decision

[60] The relevant provisions of the *Code* read as follows:

> 94.(3) No employer or person acting on behalf of an employer shall
>
> (*a*) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person
>
> (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union.
>
> ...
>
> 97.(1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that
>
> (*a*) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 47.3, 50, 69, 87.5 or 87.6, subsection 87.7(2) or section 94 or 95; or
>
> ...
>
> 98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

[61] Section 94(3)(*a*)(i) provides, *inter alia*, that no employer shall lay off or discipline any person because of that person's participation in union activities. In the matter before the Board, the only question to be determined by the Board is this: was the employer's decision to terminate the complainants' employment on October 27, 2008, motivated by anti-union animus?

[62] In *Larose-Paquette Autobus Inc.* (1990), 83 di 175 (CLRB no. 840), the Board's predecessor, the Canada Labour Relations Board (CLRB), stated the following about the Board's duty in a complaint under section 94(3)(*a*)(i) of the *Code*:

> This warrants that the Board carefully examine all the evidence to determine whether in fact anti-union animus was present. In order to prove that its action was devoid of anti-union animus, the employer can argue that the penalty imposed on the employee was rational and warranted strictly from the standpoint of sound management.
>
> (page 177)

[63] In *Echo Bay Mines Ltd.* (1995), 99 di 78 (CLRB no. 1140), the CLRB summarized the principles applicable to complaints filed under section 94(3)(*a*)(i) of the *Code* as follows:

> The Board has on numerous occasions reiterated its approach when there is an allegation someone has been terminated for union activity. There is seldom direct evidence showing that an employer's actions are motivated by anti-union animus. Anti-union motives need only be proximate cause for employer action to be found to be a violation of the *Code*. This policy was summarized by the Board in *Air Atlantic Limited* (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):
>
> "The law on the subject of discrimination against employees for having exercised rights under the *Code* is well settled. If a decision by an employer to take any of the actions described in section 184(3)(*a*) [now section 94(3)(*a*)] against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the *Code*, then the employer's actions will be found to be contrary to the *Code*. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the *Code*:
>
> '... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act—e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1) [now section 8(1)].To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.
>
> For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3) [now section 94(3)], he will be found to have committed an unfair labour practice.'
>
> (*Yellowknife District Hospital Society et al.* (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284–285; et 461)"
>
> (page 81)

[64] In *National Pagette* (1991), 85 di 1 (CLRB no. 862), the CLRB also summarized the approach to be taken in complaints filed under section 94(3)(*a*)(i) of the *Code*, particularly when dismissal is involved, as in the present case:

> When the Board examines the merits of an unfair labour practice complaint, particularly one involving dismissal, its role is very different from that of an arbitrator. The reasons for the decision to dismiss an employee are relevant only insofar as they reveal, through their nature, their occurrence in time, their severity or their impact, that the decision was motivated by anti-union animus. In discharging the reverse

> onus of proof imposed in section 98(4) of the *Code*, the employer must show that its reasons for dismissing an employee are in **no way** motivated by anti-union animus.
>
> (pages 9–10)

[65] It is important to remember that each complaint must be assessed in light of its own facts and circumstances. In complaints alleging anti-union animus, the Board generally examines the employer's conduct in light of the circumstantial evidence, including any coincidence between the time of union activities and the decision or actions that are the subject of the complaint. Regardless of whether an employer has just cause to dismiss an employee, the employer is guilty of an unfair labour practice if there is evidence of anti-union animus.

[66] Under section 98(4) of the *Code*, the burden is on the employer to refute, on a balance of probabilities, the allegations giving rise to the complaint, namely that it was aware of the complainant's union activities and that those activities were a factor in its decision to terminate his employment.

[67] However, as the CLRB noted in *Canada Post Corporation* (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426):

> ... Notwithstanding the burden of proof provisions of section 188(3) of the *Code*, there has to be some substance to a complaint upon which a contravention of the *Code* can be founded. ...
>
> (pages 115; and 14,401)

[68] In *Pierre Fiset* (1985), 55 di 233; and 85 CLLC 16,041 (CLRB no. 473), the CLRB dismissed a helicopter pilot's complaint, finding that his dismissal had not been motivated by anti-union animus. The CLRB explained that the provisions of the *Code* are sometimes relied on to try to avoid disciplinary action that is within the employer's managerial authority:

> On the other hand, an employer confronted by an employee or a group of employees who have decided to use the *Code*'s unfair labour practices provisions as a shield against a threat of being dismissed for incompetence or unsatisfactory performance of duties may be at a loss in dealing with their aggressiveness or cunning.
>
> (pages 255; and 14,275)

[69] In the matter before the Board, the main question is whether the actions and grounds raised by the then manager of public safety, Mr. Riverin, and confirmed by the employer, the Conseil des Innus de Pessamit, are the only reasons that entered into the decision, regardless of whether they are legitimate and valid.

[70] It should nevertheless be remembered that, notwithstanding the reverse onus provided for under section 94(3)(*a*) of the *Code*, regardless of the order in which the evidence is presented, it is only after consideration of all the evidence that the Board can determine whether the employer has discharged its burden of proving that its actions were not motivated by anti-union animus. This onus relates to the assessment of the evidence and not its presentation. The order of presenting evidence has no impact on the merits of the case (see *Provost Cartage Inc.* (1985), 61 di 77 (CLRB no. 517)). However, the onus is subject to an adverse ruling for failing to meet the threshold test of the non-existence of anti-union animus. The Board's determination as to the sufficiency of the evidence to satisfy the evidential burden is a question of law. To the extent that the Board is left in a state of uncertainty, the legal burden is applied to determine the outcome.

[71] In the instant matter, then, has the employer discharged its burden of proof to sufficiently establish that there was no anti-union animus?

[72] The Board has taken a detailed look at the special circumstances that existed in the period between October 11, 2008, when, according to the evidence, the complainants discussed the possibility of unionizing, amongst themselves and with Mr. Hervieux, and October 27, when the Conseil des Innus de Pessamit made the decision to terminate the complainants' employment. This is the only period of importance to the Board, since it must consider the circumstances during this period to determine whether the employer was motivated by anti-union animus in arriving at its decision to terminate the complainants' employment. The facts may be summarized as follows:

- Between October 9 and 11, 2008, the manager of public safety, Mr. Riverin, gave the complainants letters summoning them to individual meetings on October 10 or 11, 2008. Mr. Riverin gave the complainants 24 hours to respond to the offer of reinstatement attached to the letter. The reinstatement letter had also been signed by Mr. Hervieux.

-On October 11, 2008, Ms. Fontaine spoke with Mr. Riverin on behalf of the complainants, stating that they were refusing the offer.

- On October 11, 2008, the complainants met with Mr. Hervieux and raised the question of unionizing to protect their rights. Mr. Hervieux apparently told them to "[d]o what you have to do" (translation).

- On October 14, 2008, Mr. Riverin met with the Conseil des Innus de Pessamit; the excerpt of the minutes of the meeting entered into evidence indicates the following: "The Chief added that, if the police officers rejected the reinstatement agreement, the Conseil would have to make a decision" (translation). A meeting was scheduled for October 27, 2008.

- On October 15, 2008, the complainants sent Mr. Riverin a letter advising him that they planned to exercise their right to consult legal counsel.

- That same day, Mr. Riverin sent the complainants a letter advising them that the reinstatement offer was being withdrawn and that he would be making recommendations.

- On October 17, 2008, Ms. Fontaine called Mr. Riverin to ask for clarification concerning the status of the matter. Mr. Riverin informed her that a recommendation would be issued.

- Also on October 17, 2008, counsel for the complainants sent Mr. Riverin a letter indicating that, after consulting with him the day before, the complainants were now prepared to accept the reinstatement offer.

- Again on October 17, 2008, the complainants gave their attorney the mandate to file an application for certification with the Board.

- On October 20, 2008, Mr. Riverin gave Mr. Hervieux his report entitled *Recommendations*, in which he recommended that the Conseil des Innus de Pessamit terminate the complainants' employment for absence without leave.

- On October 21, 2008, the union filed an application with the Board for certification to represent the public safety police officers in Pessamit.

- On October 24, 2008, the Board advised the employer of the application for certification filed by the union on October 21, 2008.

- On October 27, 2008, the Conseil des Innus de Pessamit, at a regular meeting, accepted Mr. Hervieux's recommendation that it implement the recommendations made by the manager of public safety regarding the complainants' abandonment of their employment.

[73] The Board finds that there is nothing in the evidence to lead it to conclude that the employer was motivated by anti-union animus when it made its final decision, on October 27, 2008, to terminate the complainants' employment. It is important not to lose sight of the fact that the reasons given in support of the recommendations of the then manager of public safety to terminate the complainants' employment—recommendations that were first submitted to the director general, then approved by the Conseil des Innus de Pessamit—clearly show that there was a major labour relations problem within the Pessamit police force. The problems had been escalating, the situation had been going from bad to worse since 2007, and the complainants were, rightly or wrongly, opposed to the way the manager of public safety at the time exercised his authority. However, the Board has no authority to determine whether the penalty imposed was commensurate with the alleged offence (see *Pierre Fiset*, *supra*).

[74] It is true that, according to the evidence, the complainants informed Mr. Hervieux of their wish to unionize on October 11, 2008. They decided to unionize after seeing the reinstatement agreement they had been given by Mr. Riverin, which had been signed by Mr. Hervieux. Did Mr. Hervieux warn the Conseil des Innus de Pessamit about the complainants' intention? The evidence actually seems to show that Mr. Hervieux supported the complainants in their desire to settle the ongoing labour dispute within the Pessamit police force. The evidence also shows that the complainants placed a great deal of trust in Mr. Hervieux. Counsel for the complainants chose not to have Mr. Hervieux testify, even though the Board offered the parties an extra hearing day for this witness. Furthermore, there is nothing in the complaint before the Board to indicate any union activity of any kind exercised in any manner whatsoever by the complainants other than the application for

certification, of which the employer learned on October 24, 2008. The date of the October 27, 2008, meeting of the Conseil des Innus de Pessamit was known at least as early as October 14, 2008, as shown in the excerpt of the meeting minutes entered into evidence by the employer. That excerpt shows that the Conseil intended to make a final decision on October 27, 2008, if the police officers had still not signed the reinstatement agreement they had been given around October 10, 2008.

[75] There is no evidence that Mr. Riverin, the then manager of public safety, was informed either directly or indirectly of the complainants' wish to unionize during the period between October 11 and 27, 2008. Ms. Fontaine's testimony in this regard was clear: "there was no way this could be discussed with Mr. Riverin; he was too intransigent" (translation). According to the evidence, the complainants gave their attorney the mandate to file an application for certification with the Board on October 17, 2008, after reading the letter from Mr. Riverin dated October 15, 2008, in which he advised them that he was withdrawing the reinstatement offer and would be making recommendations. It was also on October 17, 2008, that Ms. Fontaine called Mr. Riverin to obtain clarifications concerning the status of the matter and Mr. Riverin responded that he would be making recommendations.

[76] Given the circumstances described above, the Board is of the view that the complainants panicked when Mr. Riverin decided to withdraw the reinstatement offer on October 15, 2008. Realizing as well that Mr. Hervieux would no longer be able to lend them his support and that all that they had left to protect their rights were the provisions of the *Code*, they finally decided to give their attorney the mandate to file an application for certification with the Board.

[77] In short, after considering the evidence in this case, the Board is satisfied that the action taken by the employer was not motivated by anti-union animus.

VI–Conclusion

[78] In view of the above, the Board finds that the employer's decision to terminate the employment of the complainants on October 27, 2008, was devoid of anti-union animus. The employer therefore discharged its burden of proof.

[79] For the reasons set out above, the complaint of unfair labour practice under section 97(1) of the *Code* is dismissed.

Louise Fecteau
Vice-Chairperson

Patrick J. Heinke
Member

Norman Rivard
Member